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No. 484

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ALLSTATE INSURANCE COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY; NATIONWIDE MUTUAL INSURANCE COMPANY; NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Petitioners,*

v.

EDWIN S. LANIER, Commissioner of Insurance for the State of North Carolina; T. WADE BRUTON, Attorney General for the State of North Carolina,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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EDWIN S. LANIER, Commissioner of Insurance for the State of North Carolina; T. WADE BRUTON, Attorney General for the State of North Carolina,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit entered in this case on May 27, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals, set out in Appendix A, *infra,* pp. 1a-6a, is not yet officially re-

ported. The opinion and order of the District Court (Pet. App. 5a-36a)[1] are reported at 242 F. Supp. 73.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1966 (Appendix A, *infra*, p. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A North Carolina statute compels petitioners and all other automobile liability insurance companies desiring to do business in the state to combine in a mandatory rating bureau and to fix and maintain, without deviation, identical premium rates and other uniform conditions concerning the sale of automobile liability insurance. Petitioners challenged the constitutionality of this statute in the District Court, alleging that it is in conflict with and is, therefore, preempted by paramount federal law, as expressed in the Sherman Act (15 U.S.C. 1-7) and the McCarran-Ferguson Act (15 U.S.C. 1011-1015). Finding no such conflict, the District Court dismissed the complaint and the Court of Appeals affirmed. The question presented is whether, pursuant to the Supremacy Clause, the North Carolina mandatory rating bureau law is preempted and superseded by the Sherman and McCarran-Ferguson Acts.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article VI, Clause 2, of the United States Constitution, commonly known as the Supremacy Clause; and relevant provisions of the Act of July 2, 1890, 26 Stat.

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[1] "Pet. App." refers to the printed appendix filed by petitioners in the Court of Appeals.

209, as amended (15 U.S.C. 1-7), commonly known as the Sherman Act; the Act of March 9, 1945, 59 Stat. 33, as amended (15 U.S.C. 1011-1015), commonly known as the McCarran-Ferguson Act or Public Law 15; and the General Statutes of North Carolina (Sections 58-247, 58-248.2, as amended, 58-248.3, and 58-248.4) are set out in Appendix B, *infra*, pp. 1b-4b. See also Pet. App. 1a-4a.

STATEMENT

The facts are not in dispute. Petitioners are sellers of automobile liability insurance. They are known as "independent insurers," since, unlike so-called "bureau companies," they normally file "their rates, classifications and coverages independently of the rating bureau . . ." (Dist. Ct. Fdgs., Pet. App. 10a). As such, except in those few states which compel all insurers to adhere to bureau rates and policy forms, petitioners compete by charging "rates substantially below those promulgated by rating bureaus . . . [and by] developing new types of insurance coverage and new systems of classification" (Dist. Ct. Fdgs., Pet. App. 11a). The opportunity to compete in these ways is of unquestioned importance, for in the insurance industry "[t]he competition is not only in the form of policy and costs of premiums, but in the manner of policy coverage" (*ibid.*).

This case challenges a North Carolina statute that forecloses such competition by requiring uniformity in premium rates and in the type of insurance product offered to the public (N.C. Gen. Stats. §§ 58-246 to 248.8 (1965)). Under the challenged statute, all sellers of automobile liability insurance must belong to the rating bureau (§ 58-247) and must "conform to the

rates, rating plans, classifications, schedules, rules and standards made and filed by the rating bureau" (§ 58-248.2). "[T]here is no doubt that [petitioners'] policy of charging initial premium rates at an amount substantially lower than those charged by bureau companies" (Dist. Ct. Fdgs., Pet. App. 12a), as well as competitive innovation in the type of insurance protection offered to the public, are foreclosed by this statute.

On March 13, 1962, petitioners filed a complaint under the Declaratory Judgments Act (28 U.S.C. 2201-2202) seeking a declaration that the North Carolina statute conflicts with and is preempted by paramount federal law governing competition in the interstate insurance business (Pet. App. 38a-47a). Specifically, petitioners alleged that Congress, in the McCarran-Ferguson Act, created a regulatory scheme for the interstate insurance business which authorizes the states to permit insurers to join together in rating bureaus, provided there is effective regulation, but which preserves the right of insurers to act independently of their competitors if they choose to do so. The North Carolina statute, the complaint further alleged, irreconcilably conflicts with this federally-established scheme by forcing all automobile liability insurance sellers to belong to the rating bureau and to adhere, without deviation, to the rates, rating plans, schedules, etc., filed by such bureau. (Pet. App. 44a-46a.) In sum, it was petitioners' position that under controlling federal law they are free to formulate and file their rates, rating plans, schedules, etc., independently of the rating bureau, subject always to the "extensive state supervisory control" which the District Court found extends to all automobile liability insurers, "independents" as well as "bureau companies" (Dist. Ct. Fdgs., Pet. App. 10a).

On cross-motions for judgment on the pleadings, the District Court on May 31, 1965, rendered its "Opinion and Order," and on June 2, 1965, entered its Final Judgment dismissing the complaint (Pet. App. 5a-36a). The court noted that Congress had passed the McCarran-Ferguson Act in order to remove doubts as to the effectiveness of state regulation and taxation raised by this Court's decision in *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533 (1944) (Pet. App. 25a). The court further noted that in that Act Congress had affirmed the applicability of the federal antitrust laws to the business of insurance "to the extent that such business is not regulated by state law" (15 U.S.C. § 1012(b); Pet. App. 24a-25a), and by Section 3(b) had continued the Sherman Act with respect to acts or agreements of boycott, coercion, or intimidation regardless of the extent of state regulation (15 U.S.C. § 1013(b); *ibid.*).

The critical inquiry, as framed by the District Court, was whether North Carolina's mandatory rating bureau scheme is a "means of coercion and intimidation as contemplated by . . . Section 3(b) . . ." or, as defendants maintained, is permissible state regulation within the ambit of Section 2 (Pet. App. 26a). Relying particularly on this Court's decision in *Parker* v. *Brown,* 317 U.S. 341 (1943), the District Court held that Section 3(b) relates solely to *private* conduct of the type found in the *SEUA* case (Pet. App. 27a-32a). Hence, although petitioners are "compelled" and "coerced" to subscribe to rates and practices fixed by the North Carolina rating bureau, the court concluded that "any coercion and intimidation in that respect is asserted by the state" and is not barred by Section 3(b) which only "prevents the use of coercion and intimidation or boycott by agreement of private parties . . . [and] does

not refer to action by a State in the exercise of" its regulatory powers (Pet. App. 34a-35a).

In a brief opinion, the Court of Appeals affirmed. While it recognized that "the antitrust laws were made applicable by Section 2b to insurance companies," it noted that "the debates explicitly recognized the continuing vitality of *Parker* v. *Brown*" (App. A, *infra*, p. 5a). Ignoring any distinction between the *violation* of the Sherman Act alleged in the complaint in *Parker* v. *Brown* and the declaration of federal *preemption* sought by the petitioners in the present case,[2] the court stated "that since the rating bureau was established and administered under the active supervision of the State, it was not subject to attack under the federal antitrust laws, which condemn only *private* non-competitive activities" (App. A, *infra*, p. 2a; court's emphasis). The court concluded that the McCarran-Ferguson Act "did no more than clarify the boundaries of state and federal jurisdiction over the insurance business and in no wise sought to affect the substantive controlling principle of *Parker* v. *Brown*" (App. A, *infra*, p. 6a).

REASONS FOR GRANTING THE WRIT

This case presents an important and substantial question of first impression. At issue is the validity under the Supremacy Clause and the Sherman and McCarran-Ferguson Acts of state laws which purport to regulate the interstate insurance business by creating

[2] Indeed, as discussed below (*infra*, pp. 10-18), the Court of Appeals ignored all affirmative evidence manifesting the intent of Congress in enacting the McCarran-Ferguson Act to assure the economic liberty guaranteed by the Sherman Act for those in the interstate insurance business who choose to compete rather than combine in rating bureaus with their competitors.

mandatory insurance rating bureaus and outlawing price and other forms of competition. The Court of Appeals has erroneously held that the McCarran-Ferguson Act constitutes a virtually unlimited grant of power to the several states to regulate the multi-billion dollar insurance industry as they see fit, however conflicting or inconsistent such regulation may be with the paramount federal policy expressed in the antitrust laws. This Court should decide whether such an interpretation is correct.

1. The significance of this case reaches far beyond the particular North Carolina statute involved. If the decision below is allowed to stand, the way will be open for legislatures in every state to adopt, as to all lines of insurance, the rigid restraints on rate competition and product innovation admittedly imposed by the challenged North Carolina statute (Pet. App. 12a).

This problem was anticipated and dealt with by Congress more than 20 years ago during its consideration of the bill that ultimately became the McCarran-Ferguson Act. Protesting that this bill, weakened by House Committee amendments and by adverse language in previous committee reports, had resulted in "tremendous pressure upon State legislatures" for compulsory rating bureau statutes, the American Farm Bureau Federation urged the House Judiciary Committee to make clear by amendment or by appropriate language in its report, or both, that "it is not the intent or purpose of [the bill] to encourage such price-fixing and monopoly-forming legislation . . ." (91 Cong. Rec. 1088). Responding to this appeal, the House Judiciary Committee, in House Report 143, specifically stated that it was *not* the intent or desire of Congress to require or encourage the establishment

of compulsory rating bureaus. "Competitive rates on a sound financial basis," the Report declared, "are in the public interest" (H. Rep. 143, 79th Cong., 1st Sess., p. 3).[3]

This declaration of the congressional purpose to assure competitive rates, together with changes made in the bill,[4] forestalled the "tremendous pressure" for anticompetitive rating bureau laws cited to Congress by the American Farm Bureau Federation.[5] The decision below, however, is certain to revive that pressure. Plenary consideration by this Court is needed to clarify what has now become a substantial and unsettled issue

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[3] This was in sharp contrast to the previous reports referred to by the American Farm Bureau Federation which had advocated "uniformity in rates . . ." for the insurance industry and had declared that "competition in rates . . . should be discouraged and not encouraged" (H. Rep. 873, 78th Cong., 1st Sess., p. 9 (1943)).

[4] For example, Congress deleted from the bill the words "for the purpose of enabling adjustments to be made and legislation to be adopted by the several States and Congress" which, according to the American Farm Bureau Federation, had been "cited in some States as evidence that Congress expects the States to enact legislation presented by certain insurance groups and which, if adopted, would have the effect of eliminating competitive rates" (91 Cong. Rec. 1088).

[5] Only North Carolina and two other states require uniform rates for automobile liability insurance. See Massachusetts Anno. Laws, Chap. 17, Sec. 113B and Texas Ins. Code, Art. 5.01. In addition, mandatory bureau membership, but not rate uniformity, is required for fire insurance in the District of Columbia (D.C. Code, § 35-1404), Louisiana (La. Rev. Stats., Sec. 22-1405), Mississippi (Miss. Code, Sec. 5817, 5826), North Carolina (N.C. Gen. Stats., Sec. 58-127), and for fire and automobile liability insurance in Virginia (Va. Code, Sections 38.1-227 and 38-249). Approximately a dozen states require bureau membership and rate uniformity in the workmen's compensation field (Respondent's Appendix 12b-15b).

in the field of federal-state economic regulation of the insurance industry.

2. This case also merits review because its presents for the first time important questions as to the meaning of the McCarran-Ferguson Act. By that Act, as this Court has held, Congress "put the full weight of its power behind existing and future state legislation . . ., *subject only to the exceptions expressly provided for.*" *Prudential Insurance Company* v. *Benjamin*, 328 U.S. 408, 431 (1946) (emphasis added). This case involves the important exceptions embodied in Sections 2(b) and 3(b) of the Act by which Congress undertook to chart the future relationship of federal and state authority regarding competition in the interstate insurance business. The issue raised is whether these provisions prohibit state-coerced uniformity in insurance rates and practices, or whether, as the lower courts have held, they give the states carte blanche to force insurers to combine with their competitors in state insurance monopolies.

Critical to a proper resolution of this issue is an analysis of the relationship between Section 2(b), which provides that the federal antitrust laws shall remain applicable to the business of insurance "to the extent such business is not regulated by State law," and Section 3(b), which provides that notwithstanding the extent of state regulation the Sherman Act shall remain supreme with respect to such nonconsensual matters as "boycott, coercion, or intimidation." Petitioners have maintained that an interpretation restricting the proscriptions of Section 3(b) to unregulated private conduct as found in the *SEUA* case (see District Court Opinion, Pet. App. 21a, 25a-26a, 32a), renders that obviously important provision of the Act

completely meaningless and redundant to Section 2(b) since the latter provision specifically retains, *pro tanto,* the applicability of all the federal antitrust laws to any form of private, unregulated anticompetitive conduct, including "boycott, coercion, or intimidation."

The Court of Appeals, though acknowledging that "the antitrust laws were made applicable by section 2b to insurance companies . . ." (App. A, *infra,* p. 5a), inexplicably did not even cite the crucial Section 3(b). It thus made no attempt to answer petitioners' argument that the only way to give real meaning to Section 3(b) is an interpretation, comporting fully with the intent of Congress in enacting the McCarran-Ferguson Act (*infra,* pp. 11-17), that Section 2(b) authorizes the states to *permit* regulated cooperation among competitors that otherwise would violate the antitrust laws, while Section 3(b), construed as a comprehensive prohibition of both state and private coercion, assures the right to compete for those desiring to operate independently of their competitors.[6]

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[6] That Section 3(b) was intended to preclude as permissible state "regulation" under Section 2 the establishment of mandatory rating bureaus and the elimination of rate competition is supported by the explicit declaration of Congress that "[c]ompetitive rates on a sound financial basis are in the public interest" (H. Rep. 143, *supra,* p. 3). See Brainard and Dirlam, *Antitrust, Regulation, and the Insurance Industry: A Study in Polarity,* Antitrust Bulletin (Economics Issue), Vol. XI, Nos. 1 and 2 (January-April, 1966), pp. 251-252, 255-256. Moreover, the "boycott, coercion, or intimidation" proscribed in Section 3(b) does not occur in a vacuum. The purpose of such conduct, as in *SEUA* itself from which the language is taken, is almost invariably to gain adherence to uniform prices. If identical rates may be achieved through state-imposed uniformity, there, of course, would be no need for *private* "boycott, coercion, or intimidation." It was precisely this possibility of which the American Farm Bureau Federation complained. See 91 Cong. Rec. 1088.

3. In their brief in the Court of Appeals, petitioners detailed extensive and decisive evidence, gleaned both from the face of the McCarran-Ferguson Act itself and the context of its enactment and implementation, establishing the intent of Congress to bar state-coerced uniformity with respect to such matters as rates, coverage, and policy forms. Without exception, the Court of Appeals has simply ignored this evidence, as did the District Court before it.[7]

Petitioners' position that Section 3(b) must be construed as a bar to state as well as private acts of coercion finds strong support in a statement by Senator Revercomb, a member of the Senate Judiciary Committee that studied the bill. Senator Revercomb explained to the Senate that the bill (91 Cong. Rec. 487; emphasis added):

> has as its purpose giving to the States the control of insurance and creating a moratorium, so-called, with respect to the Sherman Act and the Clayton Act, . . . and then it provides that nothing con-

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[7] The District Court, however, did mention the Report prepared by the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, issued following extensive hearings on the insurance industry in 1959 (S. Rep. 831, 87th Cong., 1st Sess.), where it was unanimously concluded (pp. 77-78):

> It is clear that section 3(b) means that State regulation under Public Law 15 may not abridge the protection from coercion, boycott, or intimidation afforded by the Sherman Act. The requirement of several State statutes for mandatory bureau membership substantially lessens competition and appears to be in conflict with the McCarran Act. . . . The McCarran Act can certainly not be viewed as justifying the acts of States in compelling all insurers to be members of rating bureaus or requiring that all rates be uniform by legislative fiat.

The District Court found this Report "informative and worthy of consideration" but "not controlling . . ." (Pet. App. 30a).

> tained in this measure shall render the Sherman Act inapplicable if any agreement *or act of the State* or an insurance company *under a law of the State creates a boycott, coercion, or intimidation.*

This authoritative definition of Section 3(b) was not contradicted or even questioned by any other spokesman during the debates, or by any committee report.[8] More importantly, this definition of Section 3(b) as a bar to *state* coercion is necessary in order to effectuate the compromise embodied in Public Law 15.

(a) The Legislative History

The distinction between voluntary or permissive cooperation among competitors, to which Congress acquiesced, and mandatory or coerced adherence to jointly-set rates and practices, which was to be disallowed, permeates the legislative history. Public Law 15 originated in a compromise proposal submitted by the National Association of Insurance Commissioners (NAIC) which was predicated on this crucial distinction. As stated in a memorandum accompanying the NAIC proposal, following a proposed moratorium period:

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[8] Senator Ferguson, one of the sponsors of the legislation, likewise recognized that Section 3(b) was intended to operate as a limitation on the kind of regulatory program the states could adopt. "In other words," he stated (91 Cong. Rec. 1481; emphasis added):

> under the terms of the bill, there are six things on which a *State could not legislate.* They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate.

Neither the District Court nor the Court of Appeals referred to these authoritative statements of Senators Revercomb and Ferguson.

> The Sherman Act shall not apply to the use of the cooperative rates, forms, and underwriting plans where state approved . . . nor to cooperative action for making of rates, rules, or plans *where their use is not mandatory.* (90 Cong. Rec. Appendix 4403-08; emphasis added).

The same emphasis upon permissive, as opposed to mandatory, combinations is found, at least by clear implication, in the committee reports. Certainly, it would have been anomalous for Congress to espouse "competitive rates," as it did in the authoritative House Report 143, *supra*,[9] if it intended to authorize all 48 states to "regulate" by abolishing rate competition. Furthermore, the committee reports stated that during the antitrust moratorium provided for by the bill, "opportunity will have been granted for the States to *permit* agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts."[10] Had the committees intended to authorize compulsory rating bureaus, the Reports could have easily declared that "opportunity will have been granted for the States to *permit or require*" participation in such combinations. But this was not the intent of Congress.

While it was uniformly recognized in the debates that rating bureaus would be permitted, it was assumed that insurers would decide for themselves whether or

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[9] See *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 413 (1953).

[10] S. Rep. 20, 79th Cong., 1st Sess., p. 2 (emphasis added); H. Rep. 68, 79th Cong., 1st Sess., p. 3; H. Rep. 143, 79th Cong., 1st Sess., p. 3.

not to participate.[11] As stated by Senator Radcliffe, an active sponsor of the bill, and a spokesman for the administration (91 Cong. Rec. 1483):

> In regard to the rating bureaus, I may say that some companies utilize them and some do not under existing laws and regulations.
>
> * * *
>
> Whether a new or old company desires to go under a rating bureau or not will be decided by its management. I do not believe that it is necessary for us at this time to assume that the States will run out on their obligations and treat the act as waste paper.

Finally, Senator O'Mahoney, "one of the principal architects of the McCarran Act" (S. Rep. 831, 87th Cong., 1st Sess., p. iii (1961)) and a Senate conferee, summed up the Act's objectives as follows (91 Cong. Rec. Appendix A 1626):

> The new law amounts to an invitation to the States and to the insurance industry to work out in good faith a system of State regulation in the public interest which shall be free from restrictive monopolistic practices *although allowing cooperative effort* among insurance companies that may be necessary to maintain their solvency... (emphasis added).

The words "allowing cooperative effort" express the true sense of Congress' purpose; and these words, like

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[11] Senator Ferguson's reference to the District of Columbia mandatory fire insurance rating bureau, on which the Court of Appeals placed great stress, is not to the contrary. Senator Ferguson was not referring to its mandatory membership feature, but was merely responding to Senator Pepper's question (91 Cong. Rec. 1481) whether a state could provide that companies "may belong to a rating bureau . . ."

the words, "contracts or agreements" with which this Court was concerned in *Schwegmann Bros.* v. *Calvert Distilleries Corp.*, 341 U.S. 384, 388 (1957), "convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing." [12]

(b) The Contemporaneous Construction of the Act

This Court has held that the contemporaneous construction of a statute by those who initiated its enactment and were later responsible for setting its machinery in motion is "entitled to great weight." *United States* v. *American Trucking Associations*, 310 U.S. 534, 549 (1940). In this case, the men who initiated Public Law 15, and after its enactment undertook to implement its provisions, were a committee of the National Association of Insurance Commissioners. These men prepared the original draft of the bill, and thereafter met with representatives of the insurance industry and with members of Congress for the purpose of "working out this compromise" (91 Cong. Rec. 1487).[13] After Public Law 15 was enacted, this

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[12] Some years later in the course of hearings on the insurance industry which he conducted, Senator O'Mahoney reiterated his understanding that the purpose of Congress in enacting the McCarran Act was to authorize the states to regulate, subject, however, to the condition "that the states did actually regulate the insurance industry *so that there would be independence of action* . . ." ("The Insurance Industry," Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 86th Cong., 1st Sess., pp. 1141-42 (emphasis added)).

[13] As Senator Barkley observed, the bill "was largely worked out by a conference of insurance commissioners who represent the people of the States and who did not take the viewpoint . . . expressed by the insurance companies, namely to instigate certain legislation in an effort to anticipate the decision of the Supreme Court [in *SEUA*] and to make it nugatory" (91 Cong. Rec. 1488).

identical committee (Pet. App. 58a), together with representatives of the insurance industry, drafted model state regulation intended to implement the purposes of the McCarran-Ferguson Act. In a memorandum accompanying the model statute, the NAIC committee declared that the language and legislative history of Public Law 15 indicated "quite plainly that Congress was willing to permit co-operative action, including price fixing, . . . and *at the same time was interested in seeing to it that reasonable competition was preserved*" (Pet. App. 95a; emphasis added). To effectuate this dual purpose, the rate-making section of the model bill provided that "uniformity among insurers in any matter within the scope of this Section is neither required nor prohibited" (Pet. App. 114a). As the NAIC committee explained, this provision was inserted in order to preserve "freedom of action upon the part of those who desire to take action independently" (Pet. App. 96a). In addition, the model act expressly provided "that nothing contained in this Act shall be construed as requiring any insurer to become a member of or a subscriber to any rating organization" (Pet. App. 115a). In sum, as a prominent member of the NAIC drafting committee observed, the drafters of the model bill "never lost sight for a moment of the congressional mandate that full opportunity for price competition should be provided and that independence of action for those who wanted it should be guaranteed" (Pet. App. 181).

Neither the District Court nor the Court of Appeals has even considered this authoritative evidence of the intent of Congress.

(c) Insurance Regulation for the District of Columbia

In May 1948, within the moratorium period, Congress enacted implementing legislation for the District of Columbia in the casualty insurance field (35 D.C. Code 1501, *et seq.*). The purpose of this legislation, as stated in the Senate Committee Report, was "to provide for the District of Columbia regulation contemplated by Public Law 15 with respect to that part of the business of insurance which is within the scope of the bill" (S. Rep. 1038, 80th Cong., 2d Sess., p. 3). Examination of the bill makes clear that Congress' understanding of the "regulation contemplated by Public Law 15" is in accord with that of the NAIC committee and confirms petitioners' contentions in this case. Thus, the District of Columbia statute expressly provides that nothing therein shall "be construed to require uniformity in insurance rates, classifications, rating plans, or practices" (35 D.C. Code 1503 (d)), and, while permitting voluntary cooperation, further provides that "no company shall be required . . . to be a member or subscriber of any rating organization" (35 D.C. Code 1505). This evidence was disregarded by the courts below.[14]

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[14] Both courts, however, adverted to a mandatory fire insurance rating bureau law passed by Congress for the District of Columbia in the session of Congress before the McCarran Act was passed (Pet. App. 26a-27a; App. A, *infra*, p. 5a). It must be emphasized, however, that congressional thinking on the subject of competition in the insurance business underwent a sharp change in the course of considering Public Law 15 (see note 3, *supra*), and that the District of Columbia fire rating bureau law permits deviation in rates. In any event, the 1948 action of Congress in implementation of the McCarran-Ferguson Act is obviously far more authoritative as to congressional understanding of its purpose than legislation adopted nearly a year before the Act was passed.

4. The Court of Appeals ignored the substantial and significant items of legislative history enumerated above because of its apparent belief that Congress in enacting the McCarran-Ferguson Act intended merely to codify the principle of the case of *Parker* v. *Brown*, 317 U.S. 341 (1943). But the "vitality" of *Parker* v. *Brown*" (App. A, *infra*, p. 5a) as authority for state-supervised mandatory rating bureaus in the interstate insurance business has been completely destroyed by the legislative history of the McCarran-Ferguson Act and the context of its enactment, matters specifically indicating an intent to curtail state power which this Court was unable to find in the history of the Sherman Act alone in *Parker* v. *Brown*. See 317 U.S. at 351.

Moreover, as this Court made clear in *Parker* (317 U.S. at 348-49), no claim was made there that the California raisin proration program conflicted with and therefore was preempted and superseded by the Sherman Act pursuant to the Supremacy Clause. Instead, the bill of complaint alleged that the state through its agricultural marketing personnel had combined and conspired with Brown's competitors in *violation* of the Sherman Act. In accordance with settled doctrine, this Court merely held that a state could not *violate* the Sherman Act. In the present case, however, it has never been alleged that North Carolina has violated the Sherman Act, but that its statute is in irreconcilable conflict with overriding federal legislation.

The distinction between *violation* and *preemption* is more than semantical. "The distinctive operations of the [state and national] governments within their respective spheres is basic to our federal constitutional

system, howsoever complicated and difficult the practical accommodations to it may be" (*Feldman* v. *United States*, 322 U.S. 487, at 490-91 (1944)). The difficulties inherent in accommodating the competing and often conflicting objectives of the two governments would most surely be compounded if the states and their officials could act in the area of economic regulation only at the peril of liability for violating some federal law dealing with the same subject matter. Policy considerations in a system of dual sovereigns dictate that the officials of either government, while carrying out their duly and lawfully assigned governmental tasks, may not be held guilty of a *violation* of the law of the other and therefore subject to its sanctions. Reaffirmation in *Parker* v. *Brown* of the settled principle that a state and its officials may not be charged with a violation of the Sherman Act appears wholly unexceptional and does not mean that state economic regulation may never be preempted by the Sherman Act.[15]

Indeed, the limitations of *Parker* v. *Brown* in a preemption context were made clear in the *SEUA* decision itself. Mr. Chief Justice Stone (who wrote the opinion in *Parker* v. *Brown*) dissented in *SEUA* on the ground, *inter alia*, that (322 U.S. at 581):

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[15] The sweeping interpretation of *Parker* v. *Brown* by the court below that an anticompetitive regulatory program of a state can never be preempted by the federal antitrust laws so long as such a program is "established and actively supervised by [the] State" (App. A, *infra*, p. 4a) could have a substantial impact in a number of industries in addition to insurance. Compare, *e.g.*, *Asheville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission*, 263 F. 2d 502 (4th Cir. 1959); *United States* v. *Utah Pharmaceutical Association*, 201 F. Supp. 29, 33 (D. Utah 1962), aff'd *per curiam* 371 U.S. 24 (1962). This expansive interpretation of *Parker* v. *Brown* provides a separate ground for review by this Court.

> The Government admits that [the insurance] statutes of at least five states will be invalidated by the decision as in conflict with the Sherman Act and the argument in this Court reveals serious doubt whether many others may not also be inconsistent with that Act.

If, as both the District Court and the Court of Appeals in the present case apparently assumed, *Parker* v. *Brown* precludes preemption by the Sherman Act of conflicting state regulatory laws, its author surely would have perceived it and would not have dissented in the *SEUA* case on the ground that the Sherman Act would invalidate an extensive system of state regulation.[16] In this connection, it is significant that Congress rejected the position of the Department of Justice that *Parker* v. *Brown* obviated the necessity of enacting legislation to preserve state insurance regulation, pointing out that the state regulation involved in that case was "in conformity with, if not supplementary to, a Federal statute," whereas "[o]bviously, all

[16] The five statutes which the Government admitted would be invalidated appeared merely to authorize private insurers to establish and maintain uniform rates without state supervision or regulation (Brief of the United States, p. 129, Records and Briefs in United States Cases (Supreme Court), Vol. 73, Oct. Term). The statement of Mr. Chief Justice Stone, however, was not limited to these five statutes but included "many others" as well. These other statutes surely included that of Virginia, which, like the North Carolina statute at issue here, made bureau membership mandatory and required uniform rates subject to approval by the Insurance Commissioner. This is the case because (1) the Virginia statute was the subject of more discussion at the oral argument (to which Chief Justice Stone specifically referred) than all the other state laws combined (*id.*, Oral Argument); and (2) the State of Virginia itself admitted in an *amicus* brief that its statute *did* conflict with the Sherman Act and would be superseded and preempted if the Act were held applicable to insurance (*id.*, Brief of the Commonwealth of Virginia, *Amicus Curiae*, p. 9).

State regulation concerning insurance does not and would not fall in such a category" (H. Rep. 873, 78th Cong., 1st Sess., at p. 7).

Thus, as both Chief Justice Stone and the Congress itself realized, there is grave doubt whether North Carolina's compulsory rate-fixing statute could have survived an attack under the Supremacy Clause even if Congress had not enacted the McCarran-Ferguson Act. That Act, however, eliminates all doubt, for, as shown above, it was the clear intent of Congress to withhold from the states authority to divest by regulation the right of insurers to take independent competitive action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 25, 1966

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,192

ALLSTATE INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Appellants,*

versus

EDWIN S. LANIER, Commissioner of Insurance for the State of North Carolina, and T. WADE BRUTON, Attorney General of the State of North Carolina, *Appellees.*

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh

JOHN D. LARKINS, JR., DISTRICT JUDGE

(Argued February 11, 1966. Decided May 27, 1966.)

Before SOBELOFF, BOREMAN and BRYAN, *Circuit Judges.*

Howard Adler, Jr., (Herbert A. Bergson, Donald L. Hardison and J. Melville Broughton, Jr., and Broughton & Broughton, and Bergson & Borkland on brief) for Appellants, and Charles D. Barham, Jr., Assistant Attorney General of North Carolina, (Thomas Wade Bruton, Attorney General of North Carolina, on brief) for Appellees.

SOBELOFF, Circuit Judge:

The State of North Carolina maintains a system of automobile insurance regulation under which uniform rates and standards are promulgated upon the initiative of a rating bureau composed of all the insurance companies, whose proposals are then finally approved, modified or disapproved by the Commissioner of insurance. North Carolina

Gen. Stats. §§ 58-246-248.8 (1965). All companies selling insurance must adhere to the established rates and standards as a condition of doing business in the State. Deviations from the prescribed rates are permitted with the approval of the Insurance Commissioner, but since a 1961 amendment to the Act, his authority is restricted to authorizing upward deviations only. See *id.* § 58-248.2, as amended by 1961 North Carolina Session Laws, Ch. 1006. Thus, the individual companies are effectively precluded from competing through offering lower premium rates, although they may still offer dividend return features, improved services, etc.

Appellants, five large insurance companies doing 29% of the total business in North Carolina, filed suit in the District Court for the Eastern District of North Carolina to obtain a judgment declaring the statute invalid insofar as it restricts competition by prohibiting the offering of lower premium rates. They alleged that the North Carolina statute had been pre-empted by the provisions of the Sherman Act, 15 U.S.C.A. §§ 1-7 (1958), and the McCarran-Ferguson Act, 15 U.S.C.A. §§ 1011-15 (1958).[1] On cross-motions for summary judgment, the District Court dismissed the complaint on the ground that since the rating bureau was established and administered under the active supervision of the State, it was not subject to attack under the federal antitrust laws, which condemn only *private* noncompetitive activities. We think this ruling was correct.

In *Parker* v. *Brown*, 317 U.S. 341 (1943), the Supreme Court held that the antitrust laws were inapplicable to an agricultural proration program which, while restricting

[1] The matter was heard in the District Court by a single District Judge. No suggestion was made that only a three-judge district court had jurisdiction to declare the North Carolina statute invalid. There is no doubt, however, that no three-judge district court is required to adjudicate an attack on a state statute on the ground that it has been pre-empted by an act of Congress. Swift & Co. v. Wickham, 382 U.S. 111 (1965).

competition among raisin growers and maintaining minimum prices, was established and actively supervised under the California Agricultural Prorate Act.

> "We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of *private* persons, individual or corporate. We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce. * * * But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, *an unexpressed purpose to nullify a state control over its officers and agents is not lightly to be attributed to Congress.*" 317 U.S. at 350-51. (Emphasis added.)

The District Court's finding in the present case that the North Carolina rating bureau was operated under the active supervision of the State is not challenged in this court,[2] and

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[2] The United States filed a memorandum in the District Court urging invalidation of the North Carolina program on the ground that it permitted the unsupervised establishment of minimum premiums by private companies. Compare Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F. 2d 502, 508-09 (4th Cir. 1959). Following the District Court's finding that establishment of rates was a governmental function, however, the United States has not joined in this appeal.

we find no merit in the distinction suggested by appellants between the injunction sought in *Parker* v. *Brown* and the declaration of pre-emption sought here. The central question in both cases is whether a program of regulation established and actively supervised by a state is subject to the antitrust laws. Absent congressional action departing from the rule of *Parker* v. *Brown,* the North Carolina statutory plan is clearly valid.[3]

Nothing in the 1945 McCarran-Ferguson Act or its legislative history suggests a limitation upon the principle of *Parker* v. *Brown.* The statute was passed in response to the Supreme Court's decision in *United States* v. *South-Eastern Underwriters Assoc.,* 322 U.S. 533 (1944) (hereafter *SEUA*), upholding an indictment against a group of private insurance companies charged with employing boycotts, coercion and intimidation to further a conspiracy to maintain noncompetitive premium rates. Because of earlier court decisions indicating that insurance was not part of commerce for the purpose of state regulation,[4] there was widespread fear that the *SEUA* case might endanger state autonomy in the regulation and taxation of the insurance business.

To allay these fears Congress declared in section 1 of the McCarran-Ferguson Act that

> "• • • the continued regulation and taxation by the several states of the business of insurance is in the public interest, and • • • silence on the part of Con-

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[3] See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36 (1961); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299, 303 (D. Mass. 1957), *aff'd mem.,* 242 F. 2d 758 (1957); Hitchcock v. Collenberg, 140 F. Supp. 894 (D. Md. 1956), *aff'd mem.,* 353 U.S. 919 (1957).

[4] See, *e.g.,* New York Life Ins. Co. v. Durlodge County, 231 U.S. 495 (1913); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869). These cases did not deal with the question posed in SEUA: Whether insurance was "commerce" falling within the regulatory powers of the federal government.

> gress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states."

Section 2a of the Act reinforces this precept by expressly subjecting insurance companies to state regulation,[5] and section 2b provides that unless a federal statute is made specifically applicable to the insurance business, it shall not "invalidate, impair or supersede" any state insurance law.[6] And while the antitrust laws were made applicable by section 2b to insurance companies,[7] the debates explicitly recognized the continuing vitality of *Parker* v. *Brown* and of state created and state supervised rating bureaus like the one now under consideration.[8]

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[5] "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C.A. § 1012(a).

[6] 15 U.S.C.A. § 1012(b).

[7] *Ibid.* Similiarly, section 4 of the Act specified that the National Labor Relations Act, 29 U.S.C.A. §§ 151-167, and the Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219, were applicable to insurance. 12 U.S.C.A. § 1014.

[8] Senator Ferguson, co-sponsor of the bill, declared

> "This bill would permit—and I think it fair to say that it is intended to permit—rating bureaus, because in the last session we passed a bill for the District of Columbia allowing rating. What we saw as wrong was the fixing of rates without statutory authority in the States; but we believe that State rights should permit a State to say that it believes in a rating bureau. * * *" 91 Cong. Rec. 1481.

See also *Id.* at 1479 (Sen. Ferguson); 1480, 1481 (Sen. Murdock); 1480, 1485 (Sen. O'Mahoney, Senate conferee on the bill, citing with approval Parker v. Brown). The President expressed the same view: "The antitrust laws do not conflict with affirmative regulation of insurance by the States such as agreed insurance rates if they are affirmatively approved by State officials." *Id.* at 1479 (letter from President Roosevelt to Senator Radcliffe).

In short, the dominant purpose of Congress in passing the McCarran-Ferguson Act was to "give broad support to the existing and future state systems for regulating and taxing the business of insurance" and "to throw the whole weight of its power behind the state systems." *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 429-30 (1946). The statute did no more than clarify the boundaries of state and federal jurisdiction over the insurance business, and in no wise sought to affect the controlling substantive principle of *Parker* v. *Brown*. We are concerned here with no scheme delegating sovereign authority to a private group, or authorizing purely private combinations in violation of the antitrust laws.[9] The North Carolina statute merely permits the carriers who belong to the rating bureau to propose rates but final authority to approve or disapprove is lodged in the Insurance Commissioner. On this basis, the District Court properly held that the statute was not subject to antitrust challenge. Whether the statutory plan embodies the wisest and most effective type of regulation is, of course, not a judicial question. The decision is

Affirmed.

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[9] Compare, *e.g.*, Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F. 2d 502 (4th Cir. 1959); United States v. Maryland State Licensed Beverage Ass'n, 138 F. Supp. 685 (D. Md. 1956).

Filed May 27, 1966

Judgment

[Caption Omitted]

Appeal from the United States District Court for the Eastern District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

/s/ SIMON E. SOBELOFF
United States Circuit Judge.

APPENDIX B

Constitutional and Statutory Provisions

1. Article VI, Clause 2, of the United States Constitution, the "Supremacy Clause," provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

3. Public Law 15, 79th Congress, 1st Session, Act of March 9, 1945, as amended by Public Law 238, Act of July 25, 1947, 15 U.S.C. §§ 1011-1015, sometimes referred to as the McCarran or McCarran-Ferguson Act, provides:

Section 1.

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 2.

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 3.

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, corecion or intimidation.

Section 4.

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Section 5.

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

4. The relevant provisions of the General Statutes of North Carolina provide as follows:

Section 58-247.

Membership as a Prerequisite for Writing Insursance; Governing Committee; Rules and Regulations; Expenses; Commissioner of Insurance Ex Officio Chairman.

Before the Commissioner of Insurance shall grant permission to any stock, nonstock, or reciprocal insurance company or any other insurance organization to write automobile bodily injury and property damage insurance in this State, it shall be a requisite that they shall subscribe to and become members of the North Carolina Automobile Rate Administrative Office.

* * * * * * * * * *

Section 58-248.2.

Insurance Policy Must Conform to Rates, etc., Filed by Rating Bureau; When Deviation Allowed.

No insurer, officer, agent or representative thereof shall knowingly issue or deliver or knowingly permit the issuance or delivery of any policy of insurance in this State which does not conform to the rates, rating plans, classifications, schedules, rules and standards made and filed by the rating bureau. A rate in excess of that promulgated by the rating bureau may be charged on any specific risk provided such higher rate is charged with the knowledge and written consent of both the insured and the Commissioner.

Section 58-248.3.

Revocation or Suspension of License for Violation of Article.

If the Commissioner shall find, after due notice and hearing that any insurer, officer, agent or representative thereof has violated any of the provisions of this article, he may issue an order revoking or suspending the license of any such insurer, agent, broker, or representative thereof.

Section 58-248.4.

Punishment for Violation of Article.

Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred ($100.00) dollars nor more than five hundred ($500.00) dollars.

5. Section 1, Chapter 1006, 1961 Session Laws of North Carolina, amended Section 58-248.2 of the General Statutes of North Carolina by deleting therefrom three sentences which read as follows:

However, an insurer may deviate from the rates promulgated by the rating bureau provided the insurer has filed the deviation to be applied both with the rating bureau and the Commissioner, and provided the said deviation is uniform in its application to all risks in the State of the class to which such deviation is to apply; and provided such deviation is approved by the Commissioner. If approved the deviation shall remain in force for a period of one year from the date of approval by the Commissioner. Such deviation may be renewed annually subject to all of the foregoing provisions.

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In The

Supreme Court of the United States

October Term, 1966

No. 484

ALLSTATE INSURANCE COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY; NATIONWIDE MUTUAL INSURANCE COMPANY; NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioners,

v.

EDWIN S. LANIER, Commissioner of Insurance for the State of North Carolina; T. WADE BRUTON, Attorney General for the State of North Carolina, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR EDWIN S. LANIER, COMMISSIONER OF INSURANCE FOR THE STATE OF NORTH CAROLINA, and T. WADE BRUTON, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA, IN OPPOSITION.

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In The

Supreme Court of the United States

October Term, 1966

No. 484

ALLSTATE INSURANCE COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY; NATIONWIDE MUTUAL INSURANCE COMPANY; NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioners,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR EDWIN S. LANIER, COMMISSIONER OF INSURANCE FOR THE STATE OF NORTH CAROLINA, and T. WADE BRUTON, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA, IN OPPOSITION.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-6a) is reported at 361 F. 2d 870. The opinion and order of the District Court (Pet. App. 5a-36a)[1] are reported at 242 F. Supp. 73.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1966 (Pet. 7a). The petition for writ of certiorari was filed on August 25, 1966. The jurisdiction of this Court

is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Should this Court consider whether the Court of Appeals erred in holding that the Sherman Anti-Trust Act is not applicable to an affirmative program of insurance regulation established and actively supervised by a state?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the United States Constitution, commonly known as the Supremacy Clause; relevant provisions of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1-7), commonly known as the Sherman Anti-Trust Act; the Act of March 9, 1945, 59 Stat. 33, as amended (15 U.S.C. 1011-1015), commonly known as the McCarran-Ferguson Act or Public Law 15; Article III, Section 1, of the North Carolina Constitution; General Statutes of North Carolina (Sections 58-5, 58-9.3, 58-246 through 58-248.8); and Chapter 1006, 1961 Session Laws of North Carolina, are set out in Resp. App. 1b-12b, 15b-16b.[2]

STATEMENT

The Legislature of North Carolina has adopted a comprehensive statutory scheme for the regulation of the business of automobile liability insurance in North Carolina. As part of this regulatory legislation, North Carolina requires all automobile liability insurers licensed to do business in North Carolina to belong to a statutory rating bureau, which proposes insurance rates and coverage standards, subject to the supervision, review and approval of the Commissioner of Insurance, an elected official of the State. All companies

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[1] "Pet. App." refers to the printed appendix filed by Petitioners in the Court of Appeals.

[2] "Resp. App." refers to the printed appendix filed by Respondents in the Court of Appeals.

which sell automobile liability insurance in North Carolina are required to adhere to the rates approved by the Commissioner, unless they have obtained his prior approval to "deviate" upward, i.e., to charge a higher rate in an individual case. Downward deviations are prohibited by statute[3], but insurers are permitted to offer policies with dividend return features. The North Carolina law provides penalties, including fines and license revocation to secure compliance with its regulatory scheme.

Petitioners contend that this regulatory scheme is inconsistent with the Sherman Anti-Trust Act (15 U.S.C. 1-7) and the McCarran-Ferguson Act (15 U.S.C. 1011-1015), and particularly with Section 3(b) of the latter Act, which provides, in pertinent part:

> "Nothing contained in this chapter [the McCarran-Ferguson Act] shall render the . . . Sherman [Anti-Trust] Act inapplicable to any agreement to boycott, coerce or intimidate or act of boycott, coercion or intimidation."

Respondents have contended that the statutory insurance regulations of North Carolina, and specifically its statutory rating bureau, amount to "state action" and not to "private action" which is the only subject of the Sherman Anti-Trust Act, as this Court has held in *Parker v. Brown*, 317 U.S. 341 (1943) and reiterated in *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). As the

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[3] See 1961 Session Laws of North Carolina, Chapter 1006 (Resp. App. 15b-16b). The prohibition of downward deviations was accompanied in the same Act by affirmative legislation establishing a Safe Driver Reward Plan which provides for a distinction in promulgated insurance rates "between classes of drivers having safe driving records and those having a record of chargeable accidents, convictions of major traffic violations and/or a series of minor traffic violations". Under the Plan promulgated by the Commissioner of Insurance pursuant to Chapter 1006 (Resp. App. 16b-24b), all persons with a three-year history of no chargeable accidents or traffic violations receive a credit of 10% of the basic rate for their classification.

Court of Appeals noted (Pet. 3a), Petitioners have not attacked the findings and conclusions of the District Court that North Carolina's statutory regulations constituted "state action" (Pet. App. 13a-18a, 31a-35a).

It is Respondent's position that there is nothing in the McCarran-Ferguson Act, and particularly nothing in Section 3(b) quoted above, which suggests any intention on the part of Congress to either expand the ambit of the Sherman Anti-Trust Act or to overrule *Parker v. Brown, supra.*

Both the District Court and the Court of Appeals for the Fourth Circuit, in a unanimous opinion, have agreed and rejected Petitioners' contentions.

ARGUMENT

I. The decisions of the District Court and the Court of Appeals add nothing new to the fabric of State insurance regulation.

The type of regulation employed by North Carolina in the field of automobile liability insurance has been in use for more than thirty years,[4] before the decision in *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944) and before the enactment of the McCarran-Ferguson Act, and it has always been considered as an acceptable means of insurance regulation. In fact, its use seems to have been encouraged by the *South-Eastern Underwriters* decision,[5] a study and analysis of which led North Carolina to

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[4] North Carolina has had a statutory bureau and uniform rates in Workmen's Compensation insurance since 1931. (Resp. App. 24b-27b)

[5] "The argument that the Sherman Act necessarily invalidates many state laws regulating insurance, we regard as exaggerated. Few states go so far as to permit private insurance companies without state supervision to agree upon and fix insurance rates. cf. *Parker v. Brown,* 317 U.S. 341, 350-352. No states authorize combinations of insurance companies to coerce, intimidate and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices." (footnote omitted) 322 U.S. at 562.

adopt its present form of automobile liability insurance regulation.[6] Several other states, and the District of Columbia, also utilize either mandatory bureaus or uniform rates, or both, for one or more lines of insurance.[7]

II. Petitioners' argument that the McCarran-Ferguson Act overruled the decision in Parker v. Brown with respect to the business of insurance has no support in the language of that statute or in its legislative history.

The essence of the Petitioners' claim is that when Congress passed the McCarran-Ferguson Act, in 1945, with the purpose "broadly to give support to existing and future systems for regulating and taxing the business of insurance",[8] it changed the scope of the Sherman Anti-Trust Act, if only with reference to the insurance business, so as to overrule the interpretation of the Sherman Anti-Trust Act which this Court announced in *Standard Oil Company v. United States*, 221 U.S. 1 (1911) and more fully developed in *Parker v. Brown, supra*, and thus prevent precisely the kind of state regulation which this Court sustained in *Parker v. Brown, supra*.[9]

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[6] See Wettach, *The 1945 Revision of the Insurance Laws of North Carolina*, 23 N.C.L.REV. 283 (1945), (Resp. App. 27b-58b)

[7] See Resp. App. 12b-15b. The District of Columbia has required mandatory bureau membership for fire insurance since 1944. (D.C. Code §35-1404)

[8] *Prudential Insurance Company v. Benjamin*, 328 U.S. 408, 429 (1946).

[9] While Petitioners twice make the contention (Pet. 6, 18) that *Parker v. Brown* decided only that a State cannot *violate* the Sherman Anti-Trust Act and not whether the Sherman Anti-Trust Act preempts State action, the decision cannot be so limited. In *Parker v. Brown*, this Court had before it an injunction (issued by the District Court) which barred enforcement of the State's prorate statute as contrary to the Sherman Anti-Trust Act and the Commerce Clause (317 U.S., at 348); this Court overturned the injunction. Chief Justice Stone specifically discussed the "preemption" doctrine, 317 U.S., at 350, before going on to find that there was no conflict between the California statute and the Sherman Anti-Trust

This contention finds no support in the language of the McCarran-Ferguson Act which is in itself a sufficient repudiation of any such purpose.[10]

Neither do Petitioners' contentions find support in the legislative history of the Act. Contrary to Petitioners' view (Pet. 6, n. 2), the Court of Appeals did not ignore the legislative history of the McCarran-Ferguson Act; in fact, after extensive argument in briefs and orally, it required both sides to submit copies of the entire legislative history for its use. On the basis of its examination of the legislative history, the Court unanimously found (Pet. 4a) "nothing in the 1945 McCarran-Ferguson Act or its legislative history to suggest a limitation on the principle of *Parker v. Brown.*"

What the legislative history of the McCarran-Ferguson Act shows is an intention by Congress to preserve to states broad freedom in the regulation and taxation of insurance, and thereby set at rest the fears generated by the decision of the Court in *United States v. South-Eastern Underwriters Association, supra,* while preserving federal jurisdiction to prevent the abuses alleged in the *South-Eastern Under-*

Act, because the Sherman Anti-Trust Act does not purport to regulate acts of a state. Contrary to Petitioners' view (Pet. 6), the Court of Appeals did not ignore Petitioners' distinction; it rejected it, with an extensive quote of the language from *Parker v. Brown* (Pet. 3a, 4a).

[10] Petitioners contend (Pet. 9-10) that the construction of Section 3(b) of the McCarran-Ferguson Act approved by the Court of Appeals rendered that section "completely meaningless and redundant to Section 2(b)". In fact, there is no such redundancy. Section 3(b) made the Sherman Anti-Trust Act applicable to *private* boycott, intimidation and coercion even during the moratorium provided in Section 3(a) when the federal anti-trust laws were otherwise in abeyance. After the moratorium ended, it remains effective as a limitation upon the proviso to Section 2(b) in that it prevents the states from adopting regulations which would permit and immunize *private* boycott, coercion and intimidation from prosecution under the federal anti-trust laws. Absent Section 3(b), the states by enacting regulatory statutes could have ousted federal jurisdiction over such *private* conduct, a danger clearly recognized by the Congress. See 91 Cong. Rec. 1486-1487. (Emphasis added.)

writers Case, namely *private* acts of coercion, boycott and intimidation, which the states had been unable or did not choose to prevent.[11]

As the Court of Appeals found (Pet. 5a), Congress recognized the continuing validity of *Parker v. Brown*.[12] What concerned it was that *Parker v. Brown* limited the options as to forms of regulation which were available to the states, and it was this concern, to permit the states to adopt more flexible regulations than *Parker v. Brown* seemed to allow, without risk of federal preemption, which led to the adoption of the proviso to Section 2(b). Under the proviso, a state could adopt regulatory statutes under which rating bureaus could be conducted without having such rating bureaus found to run afoul of the federal anti-trust laws. In fact, Congress and most states seem to have preferred at times this type of regulation to the form of regulation which this Court sustained in *Parker v. Brown* and which North Carolina has chosen to meet its own needs. But, as this Court pointed out in *Parker v. Brown*, "*'an unexpressed purpose to nullify state control over its officers and agents is not lightly to be attributed to Congress'*, 317 U.S., at 350-351. (Emphasis added.)," quoted by the Court of Appeals in its opinion (Pet. 3a). Nor, we might add, is an unexpressed purpose to amend the accepted understanding of so basic a federal statute as the Sherman Anti-Trust Act to be lightly assumed.

Furthermore, the clear import of the language of *Parker v. Brown*, that a state cannot be subject to the Sherman Anti-Trust Act while taking affirmative action, has been consistently approved in decisions since enactment of the McCarran-Ferguson Act.[13]

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[11] See Opinion of District Court, Pet. App. 21a, 24a-25a.

[12] There is ample evidence that Congress was well aware of the doctrine of *Parker v. Brown* when it debated the enactment of the McCarran-Ferguson Act. See e.g. 91 Cong. Rec. 1479, 1480.

[13] See *North Little Rock Transportation Co. v. Casualty Reciprocal Exch.*, 85 F. Supp. 961, 964 (E.D. Ark. 1949), *aff'd*, 181 F. 2d 174 (1950), *cert. den.*, 340 U.S. 823 (1950); *Miley v. John Hancock Mutual*

CONCLUSION

Petition for certiorari should be denied.

Respectfully submitted,

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September 23, 1966

Life Ins. Co., 148 F. Supp. 299, 303 (D. Mass. 1957), *aff'd mem.* 242 F. 2d 758 (1957), *cert. den.*, 355 U.S. 828 (1957); *Insurance Co. of North America v. Insurance Commissioner of Mississippi*, 237 Miss. 759, 116 So. 2d 224, 228; *Hitchcock v. Collenburg*, 140 F. Supp. 894, 902, (D. Md. 1956), *aff'd mem.* 353 U.S. 919 (1957); *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-136 (1961).